SUPREME COURT OF THE UNITED STATES

October Term, 1957

No. 259.

THE WESTERN UNION TELEGRAPH COMPANY, - - - - - - - - Petitioner,

versus

District Court decision, 141 F. Sup. 328.
C. A. 6th Cir. decision, 244 F. 2d 956.

MARY RUTH SPARKS, - - - - - Respondent.

REPLY BRIEF

OF

WESTERN UNION TELEGRAPH COMPANY.

Upon Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit.

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Supreme Court of the United States

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No. 259.

THE WESTERN UNION TELEGRAPH COMPANY, - - - - - - - - *Petitioner,*

v.

MARY RUTH SPARKS, - - - - - - *Respondent.*

WESTERN UNION'S[1] REPLY BRIEF.

Mrs. Sparks' 39-page brief, in opposition to this Court's review of her case, is an elaborate attempt (I) To make smidgens of evidence, which are too inconsequential to show any Western Union negligence, appear to raise a jury issue on that score; (II) To base completely illogical arguments upon what she calls a "trend" on the part of one utility to stop up the Safety vent holes in its manhole covers; and (III) To beeloud her own admissions, in her own testimony, of her own contributory negligence as a matter of law. Only a few of her arguments merit comment, on this petition for *certiorari.*

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[1]For brevity, the Petitioner is called "Western Union" and the Respondent is called "Mrs. Sparks".

I. Manhole covers, with "quarter-sized" *open* vent holes through the covers, do *not* present any unreasonable risk of injury to anyone, despite Mrs. Sparks' argument about the Louisville Gas and Electric Co. "trend" toward dropping removable rivets in the vent holes in some of its manhole covers.

The basis for Mrs. Sparks' argument that manhole covers with open holes through them present a risk of injury, is what she calls a "trend" on the part of Louisville Gas and Electric Co. to drop removable rivets into the holes in some of its covers.

However, any such "trend", even if it existed,[2] does

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[2] The uncontradicted evidence is that the "trend" on the part of Louisville Gas and Electric Co. toward plugging the holes is that any such practice is a specious, haphazard and dangerous expedient.

First, that Company's own engineer, Mr. Jaegle, testified that "*generally* the practice has been **to have holes** in the tops of manhole covers" (R. 79a); that "at least 99% of all" of his own Company's manhole covers "have at least one hole clear through the cover" (R. 79a); and that even when his Company drops removable rivets in the holes "we find people take them out quite frequently" (R. 74a).

Second, a detailed study of Louisville Gas and Electric's 40 manhole covers in the streets which radiate one city block in length, in the four directions, from where Mrs. Sparks fell, showed that there were not any rivets in any of the vent holes in those 40 covers (R. 130a-131a, 133a-134a, 141a-143a); and a detailed study of that Company's 32 manhole covers (with a total of 153 holes in the covers) in a 4-block area of Fifth Street (terminating only one square from where Mrs. Sparks fell) showed that all the holes were open "right straight through the full thickness" of the 32 covers (R. 164a, 166a, 167a, 171a).

Third, Mr. Jaegle condemned his own Company's "trend", when he testified that one purpose of having "open holes in the top" of a manhole cover is to "ventilate" the manhole (R. 80a), and that when the vents are reduced "you are simply taking a **greater risk** of explosions" (R. 71a-72a). Thus, he agreed with the testimony of Mr. Meiners, Director of Works, that a manhole without vent holes "becomes a *safety hazard* on the streets of the city of Louisville" (R. 124a).

not conflict with the plain fact that covers with **open** holes involve so little risk that it is shocking to leave to a jury any issue about them. Mrs. Sparks' brief admits (p. 28) that only about "one-fifth of the manhole covers" in Louisville belong to the Gas and Electric Company or have ever been so "protected" (as she describes it) by plugging them with its removable rivets. Certainly, when the remaining four-fifths or 80% of all manhole covers have *open* holes, just as intended by the manufacturer, every reasonable person must concede that such widespread use of the *open* vent hole type does not create any unreasonable risk—even apart from any common use rule.[3]

Mrs. Sparks cites Mr. Jaegle's testimony as support for her assertion (p. 4) that "There is no common practice in Louisville concerning whether covers for manholes should have holes or not". She fails, however, to reveal to the Court that Mr. Jaegle testified that "down to and including this very day",

> "while there may be some exceptions, *generally* the practice has been *to have holes* in the tops of manhole covers" (R. 79a).

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[3]The Kentucky "common use" rule applies to *physical* "things" or "instruments" or "appliances" such as a manhole cover (*Certiorari* Petition, p. 8-10), which must be distinguished from a "procedure" or "process" or "method" under some *custom* as in *T. & P. R. Co.* v. *Behymer*, 189 U. S. 468, *C. R. Herme, Inc.* v. *R. C. Tway Co.*, 294 S. W. 2d (Ky.) 534, 537, and *Empire Oil & Refining Co.* v. *Hoyt*, 112 F. 2d 356, 361, upon which Mrs. Sparks relies (pp. 16; 28). That is a distinction which Mrs. Sparks' brief repeatedly ignores, refuses to recognize, and attempts to confuse (see pp. 16-17, 25-28).

II. Mrs. Sparks' argument which she bases upon the "trend" on the part of Louisville Gas and Electric Co is completely illogical.

1. Mrs. Sparks, while asserting that widespread usage of a "thing" or "instrument" is not conclusive on the issue of negligence, illogically attempts, on the whole, to make it appear as if Louisville Gas and Electric's so-called "trend"—even if it exists in any measureable degree in respect of any appreciable number of its one-fifth of the manhole covers in Louisville—itself establishes the legal standard of care in relation to the design of the remaining four-fifths of the manhole covers (including Western Union's). At the same time, she refuses to recognize that pursuit of such a "trend", while a precaution greater than the law requires to prevent a carelessly shod inattentive lady from catching her shoe heel in a vent hole, also involves "taking a *greater* risk of *explosions*" (R. 71a-72a).[4]

Her argument further shows unwillingness to concede the importance of the impressive fact that no other accident such as this has ever before occurred from *open* vents in the remaining four-fifths of Louisville's manhole covers—which admittedly have open vent holes.

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[4]Mrs. Sparks repeatedly asserts that Mr. Meiners, Director of Works, had never complained of "a danger of gas explosion resulting from the practice" of plugging up vent holes (pp. 6, 8, 29); but she does *not* reveal to the Court that Mr. Meiners did *not* know, until the trial, that Louisville Gas and Electric had followed any such "trend" (R. 124a).

2. Mrs. Sparks says (p. 37) "the only issue involved" is "the question whether or not these covers may be placed as traps in intersections". It is respectfully submitted that the lack of any other similar cases—a lack which renders the question involved herein a novel one[3]—belies her statement of the issue. Indeed, her statement of the issue, and her description of a manhole cover with vent holes in the cover as a "trap", appear to Western Union quite ironical, since there are fully 20 appliances of various sorts, including a full dozen manhole covers equipped with *open* vent holes, in the intersection (where its Home Office is located) of West Broadway and Thomas Street, in New York City, which is widely known as the most crowded, congested and claim conscious community in Eastern United States.

3. On the one hand, Mrs. Sparks asserts that "all" parts of a street must be "kept in safe condition for pedestrians" who "may cross the street at any point without imputation of negligence" (p. 31); but on the other hand she asserts that this case "doesn't concern manhole covers in other portions of the street" but only those "in crosswalks where great numbers of people walk" (p. 37). Thus, she regards the issue of negligence as one peculiar, not only to Louisville, but to crosswalks in that city, and not only to crosswalks, but to crosswalks in its downtown intersections. The issue of negligence *vel non* cannot be so narrowly viewed. Her assertions are illogical. They amount to

[3]Which is hardly the kind of case to be disposed of by a *per curiam* memorandum decision.

a contention that the applicable standard of care must vary not only from one part of the street to another, but from one part of town to another, and from one part of the country to another.

Changing conditions may affect the applicable standard; but the proposition that a type of manhole cover which is safe in one part of one street in one city, is unsafe somewhere else in the same street in the same city or in some other city, simply does not make sense. She asserts (p. 16) "The question is not what is the standard of care in New York or Cincinnati, but what is the standard of care in Louisville, Kentucky, concerning the hazard here involved". Such inappropriate language does not deserve to be taken seriously.

Neither does the "trend" to which she refers make the proposition any more sensible. Her statement (p. 24) that "it cannot be said, as a matter of law, that this preventative action by this reputable company was not what a reasonable man would do", has neither legal nor factual significance. The true question is, whether, as a matter of law, Western Union's use of covers with open vents (a use which is frequent, commonplace and widespread not only in Louisville but all over the country) is *not* negligent, as Western Union contends. That is the hinge upon which the decision must turn.

4. As Mrs. Sparks was injured, it would be idle to deny that the presence of safety vent holes in manhole covers involves *some* risk to carelessly shod and inattentive ladies who do not look where they are going; but as shown in the *certiorari* petition (p. 13), that is a risk so small as not to be measurable—a risk which,

as a matter of law, is not an unreasonable risk or one which keeps the street from being reasonably safe for pedestrians. That is why, as stated in the *certiorari* petition (p. 6-10) it was egregious error to leave to the jury the issue of Western Union's negligence *vel non*.

5. *Southern Ry. Co.* v. *Walters*, 284 U. S. 190, completely justifies this Court's review of this case, by granting *certiorari* upon the ground of Western Union's proposition that there was no jury issue on the question of Western Union's negligence. In that case, the District Court denied Southern Railway's motion for a directed verdict upon the ground of its non-negligence; and the Circuit Court of Appeals affirmed the $28,000 judgment against Southern Railway [47 F. 2d 3]. This Court, however, granted *certiorari* [283 U. S. 815]; and then *reversed* the judgment upon the ground (which appeals to all practical minded men) that the evidence of Southern Railway's negligence, although coming from seven witnesses,

> "was so *insubstantial* and insufficient that it did **not** justify a submission of that issue to the jury" [284 U. S. at 194].[6]

6. In Mrs. Sparks' brief, she does not seem to recognize that the issue of negligence *vel non* is an issue

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[6]Mrs. Sparks, in discussing Kentucky's "common use" rule, comments that it would be more apt to call it the "obvious danger rule", and incorrectly states the rule "is never applied to an instrument" that "does not have the obvious capacity for hurt and injury". That statement hardly makes sense, in light of the fact that the Kentucky court *did* apply it to an exposed hot water return pipe in the *Greater Louisville* case (*Certiorari* Petition, p. 8-9), against a 2-year-old child to whom the pipe could **not** have had "an obvious capacity for hurt and injury".

of law, when only one *reasonable* result can be reached (1 Sherman & Redfield, Negligence, 6th Ed., Section 56, and cases therein cited). Federal courts are not loathe to remove that issue from the jury when, in their view, only one conclusion can reasonably be drawn from the facts (p. 11-12, *infra*).

Western Union should have been held, as a matter of law, not to have been negligent. To confide the issue of its negligence to a jury in a case such as this appears to practical minded men to be, in effect, a denial of due process if it be agreed that the issue of negligence *vel non* was, as Western Union contends, an issue of law.[7]

7. Mrs. Sparks' assertion (p. 5) that Western Union "does not use in all locations manhole covers with vents in them" is misleading, as indicating that the number of its covers without vents is extensive. In truth, Mr. Markley, upon whose testimony her assertion is based, testified that it uses only a "*very small*

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[7]The cases which Mrs. Sparks cites at her brief's pp. 14-15 involved appliances which, when installed, were completely safe, but became **out of repair.** (Mrs. Sparks does not claim that Western Union's manhole cover was out of repair.) Moreover, the *Holbrook* case [157 So. (La.) 566] must be regarded as having been overruled ten years later in *McQuillan* v. *City of New Orleans*, 18 So. 2d (La.) 218; and the *Upham* case [187 Mass. 220] must be regarded as having been overruled by *Corthell* v. *Great A. & P. Tea Co.*, 291 Mass. 242, in which the Court applied the same "common use" rule which prevails in Kentucky to a hot air floor register in which a lady's shoe heel caught but which the court described as a type "in common and general use", and said:

> "When the court can see that the *physical* facts, with any other evidence that may exist, do *not* warrant the inference that a reasonable man in the position of the defendant would have anticipated danger and guarded against it, a verdict for the plaintiff is *not* warranted".

number" of covers without vents. Its occasional use of those is *only* in "low" places, to guard against wash of mud and dirt, and then *only* where other nearby manholes in the same line "which have vents" sufficiently vent the line (R. 198a). Similarly, her reference to the Sewer Commission as using sewer caps without vents is misleading, in light of the fact that out of the ten sewer caps in the four-block area in which Mrs. Sparks fell (R. 126a, 138a-139a) only *one* was without vents (R. 131a, 139a).[8]

III. Mrs. Sparks' attempt to becloud her own admissions, in her own testimony, of her own *contributory negligence* as a matter of law, explains but does not sustain her opposition to this Court's review of her case.

1. Mrs. Sparks actually **admitted,** in her own testimony, that "for *many* years", she had "*seen* many of those round covers on manholes" "all over Louisville"; had "observed they have *holes* in them" (R. 49a); knew that "*all* of them have *holes* in them" (R. 50a); during a recent three months' period, at least "twice a day" "every day" she had walked over precisely this *same* crosswalk going to and from work, "at least a *hundred* times or more" (R. 26a-27a, 34a, 46a); and could *see* the manhole cover itself half way or all the way across the street (R. 47a, 53a) and "those

[8]That one sewer cap is *not* located in a crosswalk, as claimed by Mrs. Sparks (p. 20); and is *not* shown in Plaintiff's Exhibit 3, to which she refers. An analysis of the testimony will clearly show that the object which she claims that exhibit shows to be a sewer cap *actually* is the familiar solid cover (much smaller than a manhole or sewer cover) over the hollow shaft to a water main cut-off valve.

"*holes* were *visible*" to her "more than four good steps" before she stepped on the cover (R. 48a)—if she had looked.

Due care for her own safety required her to look where she was going. She *knew* she was wearing high-heeled shoes with "nickel-sized" heel taps, which were small enough to catch in one of the average "quarter-sized" manhole cover vent holes in this street, with which she was so intimately familiar.

The Kentucky *contributory negligence* law is that a plaintiff

> "*must* know those things which are *right before his eyes*, and which he himself admits having seen" (*Interstate Coal Co.* v. *Deaton*, 148 Ky. 160, 164).

Therefore, the uncontradicted evidence—Mrs. Sparks' own trial admissions—of her own **contributory negligence,** brings her directly under the *Crain* case (*Certiorari* Petition, p. 12),[9] which held that Mrs. Crain was guilty of contributory negligence *as a matter of law,* when she caught her foot on a defect in a sidewalk, which she knew about but to which she "never gave a thought" because her attention was diverted by conversation with a companion. Mrs. Crain fell at night; Mrs. Sparks fell in broad daylight.

That uncontradicted evidence brings her case directly under the same rule in Federal courts, that when only a conclusion of contributory negligence can *reasonably* be drawn from the facts, the issue of con-

[9] *Crain* v. *City of Louisville*, 259 S. W. 2d (Ky.) 52.

tributory negligence must be taken from the jury by a *directed* verdict for the defendant. That rule is dramatically illustrated in *Stoffel* v. *N.Y., N.H. & H. R. Co.*, 205 F. 2d 411 (C.A. 2d Cir.), *certiorari* denied, 346 U. S. 898. The District Court had denied a directed verdict against Stoffel, and (as here) submitted to the jury the issue of his contributory negligence. After a verdict in his favor, it denied (as here) the railroad's motion for judgment notwithstanding the verdict. On appeal, the Court (in an opinion by Judge Hand) held (*a*) That Stoffel's failure to determine whether the high tension wire, which he knew was swinging less than six feet from the top of a crate on which he was standing, had been "de-energized"—and on which he was severely burned from contact with it—made him guilty of contributory negligence as a matter of law; (*b*) That a verdict should have been directed *against* him; and (*c*) That the judgment must be "*reversed* and the case remanded with *directions* to enter judgment for the defendant."

The Court said:

> "The failure of the plaintiff to take an elementary precaution for his own safety by inquiring whether the wire was de-energized before starting to work near it was in our opinion *contributory negligence as a matter of law*. [Citations omitted] We think it just as unreasonable to come into close proximity to a high tension wire without bothering to inquire whether it is alive as it is to proceed in a strange unlighted place without investigating the possible dangers. [Citations omitted] Had the plaintiff made inquiries and proceeded with

his work knowing of the danger to which he was exposed, he *plainly* would have assumed the risk * * *" (p. 412).

As there, so here.

Mrs. Sparks admittedly "knowing of the danger" of stepping with her "nickel-sized" heel taps (which she knew were on her shoes) onto a manhole cover with vent holes through the cover (which she herself testified she knew "all" manhole covers have in them), nevertheless did so, admittedly without looking, and therefore, as said in the *Stoffel* case, "plainly" "assumed the risk".

2. Mrs. Sparks, in opposing this Court's review of her case, attempts to becloud her positive admissions of her *contributory negligence* (p. 9-10, *supra*), by such arguments as she "did *not* see the hole" before she fell; "the holes in it were *not* visible to her"; "she does *not* remember seeing this manhole previously" on the hundred or more prior recent occasions she had walked over this same crosswalk, and she "had *not* previously observed" any danger in the crosswalk (p. 2, 3, 31).

Her trial testimony belies her beclouding arguments—including her belabored excuse for not looking, that she had to be "on the lookout for automobiles" (p. 32-34).

Contrary to Mrs. Sparks' present argument (p. 30-31), there was *not* any automobile traffic moving "across or through or around the intersection" in the portion of the street where she fell. She was crossing

Market Street (which runs east and west) walking south *along* the *east line* of Fourth Street (which runs north and south). She expressly testified that there was "not" any "traffic moving across the intersection", "at the time I was crossing", and that east and west traffic on Market Street had "stopped" (R. 28a).

South bound traffic on Fourth Street was not permitted to turn left into Market Street. Any north bound traffic on Fourth Street, which was permitted to turn right, to travel in the *south* traffic lane for *eastbound* traffic on Market Street, could not possibly interfere. That is positively *established* by the fact that she fell on the manhole cover which is shown as figure 1 on the Exhibit "Trial Map" (R. 50a). That Exhibit shows that the cover is located in the *Northern* one-third of Market Street—far *north* of Market Street's eastbound traffic lane (which is along the *south* half of that street).

Those uncontradicted *physical* facts condemn and disprove her present argument. She simply *did not look*. Her excuse is completely *specious*.

3. Mrs. Sparks cites (p. 33-34) the *Monroe* case (1939),[10] and says that the *Wheeler* case (1945),[11] "as to divergence of attention from defect", and the *Verst* case (1948),[12] "as to knowledge of defect", are the cases "making the question of contributory negligence" a jury question. The trouble is, in the later 1953 *Crain* case (*Certiorari* Petition, p. 12; p. 10,

[10] *Monroe* v. *City of Louisville*, 278 Ky. 648.
[11] *City of Louisville* v. *Wheeler*, 301 Ky. 222.
[12] *City of Louisville* v. *Verst*, 308 Ky. 46.

supra),[13] the Kentucky Court expressly *overruled* not only the *Monroe* case, upon which the decisions in both the *Wheeler* and *Verst* cases were based, but also all "those cases where there has been a contrary ruling", which includes the *Wheeler and Verst* cases.

No sophistry can reasonably avoid the conclusion of Mrs. Sparks' contributory negligence as a matter of law, under the *Crain* case. It is idle for her to undertake, as she does (p. 34), to distinguish it upon the ground that it was not shown that Mrs. Sparks "had actual knowledge of the dangerous characteristics of the defendant's manhole cover". She testified that she *knew* "all" manhole covers had holes in them; *knew* about her "nickel-sized" shoe heel taps; had walked "a hundred times or more" over this same crosswalk; and the vent holes were perfectly *visible* to her—if she had looked (p. 9-10, *supra*).

CONCLUSION.

I. Even if the "common use" rule did not prevail in Kentucky, it would still have been egregious error to submit to the jury any issue of negligence on the part of Western Union. Vented manhole covers do not present an unreasonable risk of injury to pedestrians who exercise the slightest care for their own safety. They are not dangerous, obviously or otherwise, and during the long years they have been in such widespread use, Mrs. Sparks' injury on one is a novelty.

[13] *Crain v. City of Louisville*, 259 S. W. 2d (Ky.) 52.

Western Union should be held non-negligent as a matter of law.

II. Mrs. Sparks should be held contributorily negligent as a matter of law, upon the basis of her own trial admissions.

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September 12, 1957.

Certificate of Service.

I, Wm. Marshall Bullitt, Counsel for The Western Union Telegraph Company, Petitioner herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that on September 17, 1957, I served the foregoing Reply Brief upon the Respondent, Mary Ruth Sparks, by that day depositing a copy thereof in a United States Post Office, in a duly addressed envelope, with first class postage thereon prepaid, addressed to her counsel of record, John P. Sandidge, at 1805 Ky. Home Life Building, Louisville, Ky.

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